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6 IN THE UNITED STATES DISTRICT COURT
7
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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10 OLIVER HILL,

No. C 05-01185 WHA

11 Plaintiff,

12 v.

13 SAN FRANCISCO BAY AREA RAPID
14 TRANSIT DISTRICT and DOES 1 through
100, inclusive,

15 Defendants.
_____ /

**ORDER DENYING
MOTION TO AMEND
AND MOTION FOR
RECONSIDERATION AND
VACATING HEARING**

16
17 **INTRODUCTION**

18 This is an employment-discrimination case in which plaintiff Oliver Hill alleged that he
19 suffered racial harassment, a hostile-work environment and retaliation by his co-workers at
20 defendant Bay Area Rapid Transit District ("BART"). Plaintiff seeks leave to amend his
21 complaint pursuant to FRCP 16 or, in the alternative, to amend judgment pursuant to FRCP
22 59(e). No good cause exists to allow amendment of the complaint and no extraordinary
23 circumstances justify alteration of judgment. Plaintiff's motions, therefore, are **DENIED**.

24 **STATEMENT**

25 The facts underlying this litigation are discussed in more detail in the Court's order
26 dated January 17, 2006, granting in part defendant's motion for summary judgment and
27 remanding plaintiff's remaining state claim. In brief, plaintiff, an African-American male,
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1 began working for BART as a transit-vehicle mechanic in January 1999. Plaintiff alleged that
2 several of his Caucasian co-workers at the Richmond mechanic shop harassed and physically
3 intimidated him, in particular Christopher Van Fossen. Van Fossen allegedly hit plaintiff in the
4 back of his hard hat purportedly causing a cervical injury. According to plaintiff, the conduct of
5 Van Fossen was condoned by Tamar Allen, the Richmond shop manager at the time.

6 Hill was first suspended for fifteen days for filing a false complaint about the slapping
7 incident. BART human-resources officials subsequently determined that plaintiff's broader
8 allegations of harassment were speculation deriving from plaintiff's paranoia. As a result, in
9 January 2001, plaintiff was ordered to see a psychiatrist for a "fitness for duty" evaluation.
10 Plaintiff was placed on paid administrative leave pending the evaluation. After various
11 modifications of the work-restrictions imposed by the psychiatrist, plaintiff finally returned to
12 work at BART's Concord shop in October 2002.

13 In June 2003, plaintiff transferred back to the Richmond shop. Plaintiff alleged that the
14 harassment resumed upon his return. He alleged that the harassment continued until he left the
15 Richmond shop in January 2004.

16 Plaintiff filed suit in California Superior Court for the County of Alameda on August 24,
17 2004, against BART, Allen and Van Fossen. In that complaint, plaintiff alleged several claims
18 under California Government Code Section 12940, as well as intentional infliction of emotional
19 distress, assault and battery. Following a partial demurrer, plaintiff filed an amended complaint
20 on February 25, 2005, in state court, which no longer included Van Fossen or Allen as
21 defendants, only listed a claim for failure to prevent discrimination under Section 12940 and
22 added a claim for deprivation of civil rights under 42 U.S.C. 1983 against BART. BART
23 removed the case to this Court on March 23, 2005 asserting federal-question jurisdiction.
24 Plaintiff subsequently filed the operative second amended complaint on July 8, 2005, adding a
25 claim for deprivation of civil rights under 42 U.S.C. 1981 against BART.

26 The January 17 order granted defendant summary judgment as to plaintiff's federal
27 claims because plaintiff could not state a claim for municipal liability as a matter of law under
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1 *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978). The order remanded
2 plaintiff's Section 12940 claim, finding no reason to keep jurisdiction over this state-law claim.

3 Plaintiff moved to amend his complaint after oral argument on defendant's summary-
4 judgment motion, one day prior to the January 17 order. Plaintiff seeks to re-add Tamar Allen
5 as a defendant for purposes of plaintiff's Section 1981 and Section 1983 claims. After the
6 January 17 order issued, plaintiff also filed a motion for "reconsideration," in which he merely
7 incorporated by reference his briefing on the motion to amend. Plaintiff does not specify under
8 which rule he seeks reconsideration. Since the motion was filed within ten days of final
9 judgment, this order treats the latter motion as one to alter or amend the judgment under
10 FRCP 59(e).

11 ANALYSIS

12 1. MOTION TO AMEND.

13 Leave to amend a complaint shall be freely given when justice so requires under FRCP
14 15(a). FRCP 15(a), however, does not apply when a court has established a deadline for
15 amended pleadings. Once a scheduling order has been entered, subsequent amendments are not
16 allowed without a request to modify the scheduling order. A party's failure to seek
17 modification for the scheduling order is a ground to deny the untimely motion. Even if sought,
18 any modification must be based on a showing of good cause under FRCP 16(b), which entails
19 the following:

20 Rule 16(b)'s 'good cause' standard primarily considers the
21 diligence of the party seeking the amendment. . . . Although the
22 existence or degree of prejudice to the party opposing the
23 modification might supply additional reasons to deny a motion,
the focus of the inquiry is upon the moving party's reasons for
seeking modification. If that party was not diligent, the inquiry
should end.

24 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992).

25 In the Court's scheduling order dated July 7, 2005, the parties were instructed that leave
26 to add new parties must be sought by July 22, 2005. FRCP 16(b)'s good cause requirement thus
27 applies to plaintiff's motion.
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1 This is a quintessential example of lack of diligence. Plaintiff waited to bring this
2 motion until *six months* after the deadline for amendments, only when he realized he was on the
3 verge of losing on his federal claims and facing remand. He presumably determined from oral
4 argument that the Court was inclined to grant summary judgment as to his federal claims based
5 on the *Monell* doctrine. That doctrine has been around for over a quarter of a century. It should
6 not have been news to plaintiff at the hearing. Plaintiff could have sought to add Allen long
7 before but failed to do so. Indeed, while this case was still in state court, *plaintiff made the*
8 *decision to cut out Allen as a defendant.*

9 Moreover, while prejudice to defendant must not be the only consideration, this order
10 nonetheless notes the prejudice to defendant as an amplifying factor for denying leave to
11 amend. Defendant exhausted resources on moving for summary judgment and litigating this
12 case assuming Allen would not be a defendant. Plaintiff now blindsides defendant with his
13 eleventh hour request for rescue of his ill-fated federal claims. This order will not grant such a
14 request.

15 2. Motion for Reconsideration

16 Relief under FRCP 59(e) is “an extraordinary remedy, to be used sparingly in the
17 interests of finality and conservation of judicial resources.” *Carroll v. Nakatani*, 342 F.3d 934,
18 945 (9th Cir. 2003). A motion under FRCP 59(e) “should not be granted, absent highly unusual
19 circumstances, unless the district court is presented with newly discovered evidence, committed
20 clear error, or if there is an intervening change in the controlling law.” Moreover, such a motion
21 “may not be used to raise arguments or present evidence for the first time when they could
22 reasonably have been raised earlier in the litigation.”

23 Plaintiff does not identify any unusual circumstances warranting relief here. Plaintiff
24 only states that his federal claims “are important to him and are not redundant to his state FEHA
25 claim” and incorporates his motion for leave to amend by reference (Reconsideration Br. at 2).
26 The January 17 order did not reject plaintiff’ federal claims on the grounds that they were
27 unimportant or redundant. Rather, as noted above, plaintiff’s federal claims faltered under
28 *Monell* doctrine. No error is alleged with respect to the *Monell* analysis in the order.

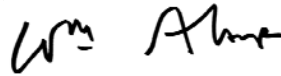
1 Plaintiff's counsel's neglect in seeking amendment of the complaint also does not justify
2 relief from judgment. Counsel did not stumble upon new evidence or even a new body of law.
3 On the contrary, plaintiff's claims were inconsistent with well-established jurisprudence
4 following *Monell*.

5 **CONCLUSION**

6 For the foregoing reasons, plaintiff's motions for leave to amend and to amend judgment
7 are **DENIED**. Finding further argument unnecessary, the hearings on these motions are hereby
8 **VACATED**.

9 **IT IS SO ORDERED.**

10 Dated: February 13, 2006



11 WILLIAM ALSUP
12 UNITED STATES DISTRICT JUDGE
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